

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Digital Output Protection Technology)	
and Recording Method Certifications:)	MB Docket No. 04-64
)	
Digital Transmission Copy Protection)	
)	

**OPPOSITION OF
PHILIPS ELECTRONICS NORTH AMERICA CORPORATION**

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Table of Contents

I.	INTRODUCTION AND EXECUTIVE SUMMARY	1
II.	THE COMMISSION’S REQUIREMENT OF REASONABLE AND NONDISCRIMINATORY LICENSING AS A CONDITION OF CERTIFICATION IS CONSISTENT WITH ITS DECADES-OLD PATENT POLICY, ITS ADOPTION OF THE DTV STANDARD, AND ITS OBLIGATION TO REGULATE IN THE PUBLIC INTEREST	6
A.	The Commission’s Long-Standing Patent Policy, Particularly As Applied To The DTV Transition, Requires Reasonable And Nondiscriminatory Licensing.....	7
B.	The Commission Has Already Decided That Reasonable And Nondiscriminatory License Terms Are A Requirement For Certification	9
C.	The Commission’s Obligation To Regulate Broadcasting In The Public Interest Also Requires Licensing That Safeguards Against Anticompetitive Effects	9
III.	DTLA’S RELIANCE ON THE MARKETPLACE TO SAFEGUARD COMPETITION, AS OPPOSED TO THE COMMISSION’S INSISTENCE ON REASONABLE AND NONDISCRIMINATORY LICENSING, IS ESPECIALLY INAPPROPRIATE UNDER THE CIRCUMSTANCES PRESENTED HERE	11
IV.	THE DTCP MANDATORY AND OPEN-ENDED LICENSEE NON-ASSERT PROVISION (§ 5.3) CONFISCATES INTELLECTUAL PROPERTY AND IS UNREASONABLE AND DISCRIMINATORY	15
V.	DTLA’S ASSERTION OF THE POWER TO CONTROL DOWNSTREAM APPROVAL OF TECHNOLOGIES IS ANTICOMPETITIVE AND UNREASONABLE	21
VI.	DTLA’S ASSERTION OF THE RIGHT TO CHANGE COMPLIANCE RULES AND TECHNOLOGY WITHOUT LICENSEE INPUT IS UNREASONABLE AND DISCRIMINATORY	28
VII.	THE DTCP COMPLIANCE RULES DISCRIMINATE UNREASONABLY AGAINST CONSUMER ELECTRONICS DEVICES.....	33
VIII.	DTLA SHOULD NOT IMPOSE COMPLIANCE REQUIREMENTS THAT EXTEND BEYOND THOSE THE COMMISSION HAS DEEMED NECESSARY AND APPROPRIATE TO PROTECT REDISTRIBUTION- CONTROLLED CONTENT	34
IX.	DTCP SHOULD BE APPROVED FOR SPECIFIC TRANSPORTS WHERE THE TECHNOLOGY IS DEFINED	36
X.	CONCLUSION.....	37

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Philips Electronics North America Corporation (“Philips”) respectfully submits this opposition to the Digital Output Protection Technology Certification filed by the Digital Transmission Licensing Administrator, LLC (“DTLA” or “5C”) in the above-referenced docket.¹ In the event that the Commission decides to approve DTLA’s certification, it should condition such approval upon elimination of license terms that are unreasonable and discriminatory in violation of the *Broadcast Flag Report and Order*.²

I. INTRODUCTION AND EXECUTIVE SUMMARY

In its *Broadcast Flag Report and Order*, the Commission required that publicly offered digital broadcast content protection technologies be licensed on reasonable and

¹ *In the Matter of Digital Output Protection Technology and Recording Method Certifications: Digital Transmission Content Protection* (“DTCP”), MB Docket No. 04-64 (March 1, 2004) (“*DTCP Certification*”); *Certifications for Digital Output Protection Technologies and Recording Methods to be Used in Covered Demodulator Products: Commission Announces Certifications Received and Opens Window for Comments and Oppositions*, *Public Notice*, DA 04-715 (*rel.* March 17, 2004).

² *In the Matter of Digital Broadcast Content Protection*, MB Docket No. 02-230, *Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 23550 (2003) (“*Broadcast Flag Report and Order*” and “*Broadcast Flag FNPRM*” as appropriate).

nondiscriminatory terms.³ To give effect that that command, the Commission compelled applicants for certification to submit licenses for Commission review, including “evidence that the technology will be licensed on a reasonable and nondiscriminatory basis.”⁴

Philips believes that this requirement of reasonable and nondiscriminatory licensing is indispensable to the effective operation of the entire Broadcast Flag regulatory regime. The public interest good flowing from the Commission’s decision to approve digital broadcast content protection technologies, instead of delegating those decisions to private parties with great financial stakes in the outcome, will be undermined if the Commission fails to give meaning to its reasonable and nondiscriminatory licensing mandate.

As Philips has urged throughout the Broadcast Flag proceeding, the terms and conditions upon which digital content protection and recording technologies are licensed, including the critically important compliance and robustness rules that perpetuate the Commission’s rules downstream, will play a central role in determining how and whether competition and innovation will develop and flourish in the technology and equipment marketplaces. The regime adopted by the Commission to implement the Broadcast Flag is a unique hybrid, combining a government technology mandate, with the full force and effect of law, together with a reliance on private licenses that have the power to confer enormous market power on the licensors, who typically are competitors of other manufacturer licensees. In such a situation, the well-established Commission policy that licensing be on a reasonable and nondiscriminatory basis is essential to prevent the manipulation of government power to enforce self-serving decisions of private parties having the potential to reconfigure the competitive landscape for their own advantage.

³ See *Broadcast Flag Report and Order* at ¶ 55.

⁴ 47 C.F.R. § 73.9008(a)(4).

The facts involving DTCP make reasonable and nondiscriminatory licensing imperative. Competitive concerns are at their greatest where there are a limited number of technologies approved for a particular purpose, where network effects will make a single technology dominant, where technologies have been given other marketplace head-start advantages, or where a group of competitors jointly develop and market a technology. All of these aggravating factors apply to DTCP. DTCP is the only general CCI-based link-protection system for interfaces that permits the recording of content—no meaningful competitor has been submitted to the FCC.⁵ As the DTLA itself has argued,⁶ the market is subject to significant network effects. DTCP is a joint project of five major competitors, which together have market power. Further, DTCP has a special, favored place as a result of the DFAST agreement and its approval by the DVD-CCA for use in DVD players. Thus, it has an enormous head-start advantage in a consumer electronics marketplace characterized throughout history by rapid movement towards standardized interfaces that consumers can understand.

Rather than embracing the Commission’s reasonable and nondiscriminatory licensing requirement, DTLA seeks to persuade the Commission that it should not concern itself with the details of the DTCP license, and that the marketplace can sort it out.⁷ DTLA’s desire to avoid

⁵ The two proprietary DRM-based systems (Windows Media and Helix) and the “authorized domain”-based SmartRight rely on significantly different approaches and architectures than link-based systems such as DTCP. Further, Windows Media and Helix fit most comfortably with connected, upgradeable IT devices, not with stand-alone consumer electronics devices, and SmartRight requires a smart card infrastructure. Thus, these technologies are not substitutes for DTCP. The other proposed technologies are “Authorized Recording Methods,” which will not compete at all with DTCP.

⁶ See Comments of the Digital Transmission Licensing Administrator LLC, MB Docket No. 02-230 (Feb. 13, 2004) (“*DTLA FNPRM Comments*”) at 16.

⁷ See *Id.* at 16; Reply Comments of the Digital Transmission Licensing Administrator LLC, MB Docket No. 02-230 (March 15, 2004) (“*DTLA FNPRM Reply Comments*”) at 9-17; *DTCP Certification* at 15, n.2.

Commission scrutiny of the DTCP license terms is understandable because critical provisions are patently unreasonable and discriminatory.

There are certain hallmarks of a reasonable, nondiscriminatory licensing structure that the Commission should apply in evaluating licensing terms for technologies proposed for the broadcast flag:

1. No Use of “Non-Assert” Provisions. A regulatory regime intended to protect intellectual property should not have, as a condition for participation, a requirement that manufacturers forfeit their intellectual property.
2. Provisions That Promote Competition. Technologies should be offered on terms that promote competition; license terms that may inhibit or distort competition should not be approved. Thus:
 - a. No Gatekeeper Control. A technology provider should not have the power to act as a gatekeeper to withhold downstream approval of other FCC-approved technologies.
 - b. Limited, Inclusive, Transparent Change Management. Changes in the technology and applicable compliance rules should be subject to a process that is open and fair to manufacturer licensees who often compete in product markets with the licensor.
 - c. CE-IT Parity. License terms, particularly those that establish downstream compliance and robustness rules, should not discriminate between consumer electronics and computer-based devices and applications.
3. Public Policy Is Left To Public Policymakers. Decisions on public policy issues are properly made by the Commission, not by private licensors. Thus:
 - a. Consistent, Ubiquitous Compliance Rules. Absent compelling circumstances, downstream compliance rules imposed by technology licenses should mirror those determined by the Commission to set an appropriate level of redistribution control; and

- b.** Platform-by-Platform Approval of Technologies. The Commission should not grant an open-ended approval to any technology operating under the same name as the approved technology. Technologies should be approved for specific uses on specific platforms.

The DTCP license contains key provisions that are inconsistent with these principles and that would impede evolution of rival technologies and unnecessarily raise artificial barriers to entry.⁸ The Commission should not approve DTCP without conditioning such approval on the following changes to the DTCP license:

1. DTLA should be required to remove any reciprocal non-assert from its agreement and replace it with a reciprocal obligation to license on reasonable and non-discriminatory terms. Further, the reciprocal obligation should not be subject to expansion and should be clearly and correctly linked to disclosed patents or other legitimately protected intellectual property that the licensee is required to license for the use of DTCP to protect commercial audiovisual content.
2. The DTCP compliance rules should provide that in the United States, Decrypted DTCP content bearing the EPN (redistribution controlled) state (i) may be output over any output technology that is permitted by the Commission under §73.9004(a), and (ii) may be recorded using any technology that is permitted by the Commission under § 73.9004(b). At minimum, any Authorized Digital Output Protection Technology and any Authorized Recording Method should be deemed approved by DTLA for use with EPN content.
3. Necessary changes in compliance rules applicable to EPN content should be subject to the process of amending Part 73. Any changes in an approved specification that are to be permitted should be subject to an open process that includes early, specific notice to licensees, licensee input, and Commission review and approval of the change, considering its impact on licensees and the public, as well as on content providers.

⁸ Philips is submitting objections to DTCP, CPRM and HDCP, which are the technologies that create the greatest immediate commercial concern. In addition, these are the technologies that have obtained the most significant head-start advantage and, therefore, which will benefit most from the barriers to entry created by their license agreements. Philips notes that a number of other technology proponents have submitted licenses that fail to meet the criteria discussed in this opposition, and urges the Commission to review these proposed licenses in furtherance of its mandate to protect the public interest

4. More generally, Compliance Rules applicable to EPN content in the United States should be those the Commission has decided are necessary and appropriate in Part 73. Specifically, integrated recording devices (e.g., personal video recorders) should be permitted to use physical, in addition to cryptographic means, to bind content to a single device.
5. The DTCP Compliance Rules should not discriminate against CE products in favor of computer products. In particular, the right to use VGA and high-definition VGA outputs should not be limited to computer products, but should extend to consumer electronics products.
6. DTCP should be approved on a transport-by-transport basis. If DTLA believes that a different technology named DTCP is appropriate for a different transport, DTLA has the right, like any other technology proponent, to submit that technology for approval under the Commissions expeditious approval process.

II. THE COMMISSION’S REQUIREMENT OF REASONABLE AND NONDISCRIMINATORY LICENSING AS A CONDITION OF CERTIFICATION IS CONSISTENT WITH ITS DECADES-OLD PATENT POLICY, ITS ADOPTION OF THE DTV STANDARD, AND ITS OBLIGATION TO REGULATE IN THE PUBLIC INTEREST

In its DTCP certification, DTLA attempts to convince the Commission that it need not concern itself with specific licensing terms because the “market” should be the sole determinant regarding their appropriateness.⁹ According to DTLA, “...it is competition in the market place, rather than government control over license terms, that will result in greater economic and social benefits for content owners, consumers and manufacturers....”¹⁰ DTLA is essentially suggesting that it is inappropriate for the Commission to regulate, and remain involved with the newly regulated market to ensure the desired outcome of its regulations. DTLA’s position is not only illusory, in that it conveniently ignores the Commission’s *adoption* (as opposed to mere consideration) of the requirement that Broadcast Flag-certified technologies be licensed on reasonable and nondiscriminatory license terms, but is contrary to Commission precedent.

⁹ See *DTCP Certification* at 15, n.2.

¹⁰ *Id.*

A. The Commission's Long-Standing Patent Policy, Particularly As Applied To The DTV Transition, Requires Reasonable And Nondiscriminatory Licensing

The Commission's policy of requiring licensing on reasonable and nondiscriminatory terms dates back to 1961 when it established its patent policies.¹¹ The Commission long has promulgated technical standards for common carriers, broadcasters, and other services that require use of patents in order to construct equipment that will comply with the Commission's rules. In conjunction with such regulation, the Commission has always required beneficiary patent applicants and holders to grant non-exclusive licenses to every responsible party on reasonable terms for the manufacture, use and sale of the communications equipment covered by the Commission's rules and regulations.¹²

One of the clearest and most recent expressions of the Commission's patent policies came in the Advanced Television proceeding that culminated in adopting a digital television standard, a series of orders in a proceeding directly related to this Broadcast Flag proceeding. There the Commission and its Advisory Committee stated that it expected proponents to "adopt a

¹¹ See Revised Patent Policies of the Federal Communications Commission, *Public Notice*, 3 FCC 2d 26 (1961). In 1961, the Commission established a specific staff to study the assignment and licensing arrangements for patents related to the Commission's rules and to report to the Commission whenever it appeared that the management of any patent rights indicated a potential to obstruct service provided pursuant to standards adopted by the Commission. (In fact, monopoly in patents necessary for the design of communications equipment has been of concern to government regulators since the early days of radio, when the Marconi Company attempted to maintain control of its circuit designs for stations used aboard ships and on shore. The policy has been consistent of not adopting communications standards that would have the effect of sanctioning a monopoly or other competitive abuse through the patent process.)

¹² In fact, at one time, the Commission required common carriers (such as AT&T, RCA, and Western Union) to file with it semi-annual patent reports. In addition, in 1961 when adopting rules to permit stereo FM, the Commission required statements from each proponent that the proponent would grant non-exclusive licenses to any responsible party at reasonable royalties. It found such representations to be "consistent with the patent policies of the Commission." See *Amendment of Part 3 of the Commission's Rules and Regulations to Permit FM Broadcast Stations to Transmit Stereophonic Programs on a Multiplex Basis*, Docket No. 13506, *Report and Order*, 21 RR 1605, at n.4 (1961).

reasonable patent structure and royalty charging policy.”¹³ The testing procedures for Advanced Television systems required each proponent to agree in writing that “any relevant patents they own would be made available either free of charge or on reasonable, nondiscriminatory terms.”¹⁴ The Commission was clear in its mandate: “...we will condition the selection of any ATV system on the proponent’s commitment to reasonable and nondiscriminatory licensing of relevant patents.”¹⁵ Finally, in 1996, when the Commission adopted the DTV Standard, it explicitly premised its adoption “on reasonable and nondiscriminatory licensing of relevant patents” and added that “if a future problem is brought to our attention, we will consider it and take appropriate action.”¹⁶ The Commission summarized its policies as follows:

We have previously stated that in order for DTV implementation to be fully realized, the patents on a DTV standard would have to be licensed to other manufacturing companies on reasonable and nondiscriminatory terms. In response, the Advisory Committee’s testing procedures have required proponents of any DTV system to follow American National Standards Institute patent policies which require assurance that: (1) a license will be made available without compensation to applicants desiring to utilize the license for the purpose of implementing the standard; or (2) a license will be made available to applicants under reasonable terms and conditions that are demonstrably free of any unfair discrimination.¹⁷

¹³ See *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, MM Docket No. 87-268, *Notice of Proposed Rulemaking*, 6 FCC Rcd 7024, at 7034, ¶ 46 and n.84 (1991).

¹⁴ *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, MM Docket No. 87-268, *Second Report and Order and Further Notice of Proposed Rulemaking*, 7 FCC Rcd 334 at 3358, ¶¶ 68-69 (1992).

¹⁵ *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, MM Docket No. 87-268, *Memorandum Opinion and Order/Third Report and Order/Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 6924 at 6981-82, ¶¶ 78-79 (1992); accord, *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, MM Docket No. 87-268, *Fifth Further Notice of Proposed Rulemaking*, 11 FCC Rcd 6235 at 6260-61, ¶ 67 (1996) (“Fifth Further Notice”).

¹⁶ *Advanced Television Systems and Their Impact on the Existing Television Broadcast System*, MM Docket No. 87-268, *Fourth Report and Order*, 11 FCC Rcd 17771 at 17794, ¶¶ 54-55 (1996).

¹⁷ *Fifth Further Notice* at 6260-61, ¶ 67.

B. The Commission Has Already Decided That Reasonable And Nondiscriminatory License Terms Are A Requirement For Certification

The Commission, in its *Broadcast Flag Report and Order* has *required* that license terms for certified Broadcast Flag-compliant technologies be reasonable and nondiscriminatory.¹⁸ This is a requirement under the Commission's existing rules, not a question of policy up for continued debate where an actual certification is submitted under those rules. Nonetheless, DTLA's certification for DTCP continues to question the Commission's selection of reasonable and nondiscriminatory license terms as a factor to consider in assessing a technology's compliance with the interim adopted by the Commission.¹⁹

DTLA's continued discussion, appropriate for a policy debate, is out of place in regards to its proffered certification for DTCP. Again, the Commission has adopted reasonable and nondiscriminatory licensing as a requirement, not merely proposed it for further consideration. The fact that DTLA continues to argue these points only underscores the fact that DTCP's license terms fail to meet the *requirements* of reasonable and nondiscriminatory licensing.

C. The Commission's Obligation To Regulate Broadcasting In The Public Interest Also Requires Licensing That Safeguards Against Anticompetitive Effects

The Commission has rested its authority to implement the Broadcast Flag on its *ancillary jurisdiction* to regulate broadcasting.²⁰ A necessary corollary to its exercise of that jurisdiction is the requirement that the Commission regulate to further broadcasting in a manner that serves the public interest.²¹ Commission precedent includes numerous examples where the Commission

¹⁸ *Broadcast Flag Report and Order* at ¶ 53.

¹⁹ *See DTCP Certification* at 15, n.2.

²⁰ *See Broadcast Flag Report and Order* at ¶ 29.

²¹ *See Id.* at ¶ 30.

issues a decision or regulation, and contrary to the assertions of DTLA, not only remains engaged with the newly regulated market, but implements pro-competitive conditions designed to ensure its regulatory goals are achieved in furtherance of the public interest.

For example, section 310(d) of the Communications Act requires the Commission to ensure that license transfers serve the “public interest, convenience, and necessity.”²² The Commission’s review, “includes, *but is not limited to*, an analysis of the potential competitive effects of the transaction, as informed by traditional antitrust principles.”²³ Thus, in the Commission’s recent decision approving the DIRECTV/NewsCorp transaction, the Commission specifically required procompetitive provisions to safeguard against potential, foreseeable anticompetitive effects resulting from its regulatory action.²⁴

It would be seductively simple for the Commission to require all CE and IT products to recognize and give effect to the Broadcast Flag, and then turn its back on whatever occurs in the marketplace, as DTLA advocates. Fortunately, the Commission has chosen a different course. By requiring that approved digital content protection technologies be licensed on reasonable and nondiscriminatory terms, the Commission has undertaken to safeguard against potential anticompetitive consequences of its Broadcast Flag regulatory regime, consistent with its obligation to regulate broadcasting in the public interest. The discharge of that obligation requires the Commission to reject DTCP or in the alternative condition its approval on

²² 47 U.S.C. § 310(d).

²³ *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, CS Docket No. 00-30, *Memorandum Opinion and Order*, 16 FCC Rcd 6547, 6555 at ¶ 21 (2001) (emphasis added).

²⁴ *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, For Authority to Transfer Control*, MB Docket No. 03-124, *Memorandum Opinion and Order*, 19 FCC Rcd 473, at ¶¶ 358-370, App. F (2004).

elimination from its license of unreasonable and discriminatory terms and substitute therefore provisions that will safeguard competition.

III. DTLA'S RELIANCE ON THE MARKETPLACE TO SAFEGUARD COMPETITION, AS OPPOSED TO THE COMMISSION'S INSISTENCE ON REASONABLE AND NONDISCRIMINATORY LICENSING, IS ESPECIALLY INAPPROPRIATE UNDER THE CIRCUMSTANCES PRESENTED HERE

While reliance on the market may well work in freely competitive environments lacking barriers to entry, combinations of competitors and government regulation, the “marketplace” of content protection technologies available for the protection of broadcast content meets none of these characteristics. Indeed, numerous characteristics of the marketplace facing manufacturers who wish to deploy devices to handle DTV content confirm the need for careful scrutiny of license terms and conditions.

- There is a government regulation effectively mandating use of approved technologies. This eliminates free and open competition. The technologies that are approved first will have enormous marketplace advantage, insulated from the normal operations of the market.²⁵
- In the case of DTCP, this advantage is compounded by the prior approval of DTCP under the DFAST and PHILA licenses, and the approval of DTCP for DVD players by DVD-CCA.
- Head start advantage is recognized, in markets with network effects, to be a significant barrier to entry by federal antitrust regulatory enforcement authorities.²⁶ In one speech, a prominent Department of Justice Antitrust Division

²⁵ If others in this proceeding have their way, the barriers become even higher, with the requirement of content provider approval or approval by competing consortia of technology providers.

²⁶ See, e.g., R. Hewitt Pate, Asst. Att’y Gen., Antitrust Div., U.S. Dept. of Justice, Telecommunications Competition, Address Before the Practicing Law Institute (Dec. 4, 2003), *available at* <http://www.usdoj.gov/atr/public/speeches/201734.htm> (“Network effects and first-mover advantages may...exacerbate the problems facing entrants.”); Constance K. Robinson, Director of Operations and Merger Enforcement, Antitrust Div., U.S. Dept. of Justice, Network Effects in Telecommunications Mergers, Address Before the Practicing Law Institute (Aug. 23, 1999), *available at* <http://www.usdoj.gov/atr/public/speeches/3889.htm> (“The Characteristics of network industries make them prone to dominance by a single firm.”) (“Robinson Speech”); A. Douglas Melamed, Deputy Asst. Att’y Gen., Antitrust Div., U.S. Dept. of Justice, Network Industries and Antitrust, Address Before the Federalist Society (April 10, 1999), *available at* <http://www.usdoj.gov/atr/public/speeches/2428.htm>

official stated, “in industries in which network effects are significant, there is an increased likelihood that a single firm may come to dominate the market and persist in that dominance.”²⁷ Another recognized that “it does not take much for one technology to become dominant [and the] technology that garners the early lead tends to become locked in as the winner.”²⁸

- This is particularly true in the consumer electronics industry, which historically has been characterized by a recognition of the substantial consumer interest in standard interfaces and convergence on *de facto* or *de jure* standards.
- No competitor for DTCP has been proposed. It is the only link protection technology that permits the carriage of compressed video capable of supporting recording. DTCP’s head start advantage resulted, among other things, from it being enshrined by the CSS license (drafted by two 5C members) with an advantaged position.
- Here DTLA seeks to lock in its head start advantage by dictating which approved technologies are permitted to handle content from DTCP.

DTLA posits that a manufacturer that does not like its license terms can either (i) negotiate changes, (ii) use a different technology, (iii) or create its own. None of these are effective alternatives to the Commission’s ensuring that it only approves technologies that are licensed on reasonable and nondiscriminatory terms. In the absence of a competing technology

(“network effects can increase the incentive for, and thus the likelihood of, anticompetitive conduct”); Carl Shapiro, Deputy Asst. Att’y Gen., Antitrust Div., U.S. Dept. of Justice, Antitrust in Network Industries, Before the American Law Institute and American Bar Association (Jan. 25, 1996), *available at* <http://www.usdoj.gov/atr/public/speeches/shapir.mar.htm> (“once achieved, the network effects that helped create dominance may make it more difficult for new entrants to dislodge the market leader than in other industries lacking network characteristics”).

²⁷ Daniel L. Rubinfeld, Deputy Asst. Att’y Gen., Antitrust Div., U.S. Dept. of Justice, Competition, Innovation, and Antitrust Enforcement in Dynamic Network Industries, Address Before the Software Publishers Assoc. (March 24, 1998), *available at* <http://www.usdoj.gov/atr/speeches/1611.htm> (“Rubinfeld Speech”).

²⁸ See *Robinson Speech*; accord, *United States v. Microsoft Corp.*, 253 F.3d 34, 49 (D.C. Cir. 2001) (“In markets characterized by network effects...[o]nce a product or standard achieves wide acceptance, it becomes more or less entrenched.”).

and the presence of the barriers to entry discussed above, options (ii) and (iii) are chimerical. Further, using a different technology cuts a device off from the installed base of devices that have DTCP inputs. DTLA's invitation to negotiate is equally ephemeral. DTLA has steadfastly refused to negotiate about the terms identified in this objection. Philips submitted its concerns to DTLA in advance of a conversation on September, 2002. Although DTLA promised a full response, none was received. Most recently, in connection with a renewed effort, Philips submitted a list of concerns to DTLA on January 19, 2004. More than two months have now passed and Philips has received no response whatsoever (other than DTLA's comments in the Broadcast Flag proceeding and its certification, rejecting the concerns raised by Philips).

Further, while IP licensing may be pro-competitive, it is well recognized that collective licensing by a pool of competitors can be fraught with antitrust dangers and can raise substantial competition concerns, both in the particular technology market and in related product markets.²⁹ Antitrust agencies and courts have long been concerned with ways such a pool can be misused to impede evolution of rival technologies, confer market power upon "insiders" (founders and licensors) to the disadvantage of "outsiders" (licensees) in ways that impede the latter's ability to

²⁹ See, e.g., *Antitrust Guidelines for the Licensing of Intellectual Property*, U.S. Dept. of Justice and Federal Trade Comm'n, at § 3 (April 6, 1995) ("*Antitrust Guidelines*"), available at <http://www.usdoj.gov/atr/public/guidelines/ipguide.htm>. DTLA asserts in its FNPRM Reply Comments that none of its license terms have been shown to be "*per se* unlawful." See *DTLA FNPRM Reply Comments* at 14. That, however, is a straw-man argument. Antitrust regulators generally apply "rule of reason" analysis to most aspects of patent pool activities, but that by no means suggests a lenient standard. As shown by the business review letters cited and discussed herein, the "rule of reason" analysis applied to patent pools is exhaustive and searching, and where license terms or behavior are found to inhibit competition, regulators require modifications to the arrangement. Even the *Antitrust Guidelines* cited by DTLA in support of its "*per se*" claim, expressly recognizes that "pooling arrangements can have anticompetitive effects." See *Antitrust Guidelines* at § 5.5.

compete and raise artificial barriers to entry, and otherwise suppress technology and product competition generally.³⁰ Competition concerns are particularly significant when substantial competitors in the marketplace pool their technologies and engage in concerted activity.³¹

Further, restrictions contained in license agreements can be abused to distort competition in the technology market or in related product markets.³²

Thus, among other things, antitrust regulators regularly review licensing pool agreements, and examine specific provisions for competitive effect.³³ The general rule is that

³⁰ See, e.g., Letter from Charles A. James, Asst. Att’y Gen., Antitrust Div., U.S. Dept. of Justice, to Ky P. Ewing, at 1 (Nov. 12, 2002) (“*3G Platform Business Review Letter*”), available at <http://www.usdoj.gov/atr/public/busreview/200455.htm> (the DOJ required “substantial modifying” of the pool proposal); *Id.* at 9 (“[W]here integration of patents [in collective licenses] occurs, issues of competitive harm can . . . arise with respect to intellectual property rights within the [licensed standard] or downstream products incorporating the patents or in innovation among the parties to the [standard].”); Letter from Joel I. Klein, Acting Asst. Att’y Gen., Antitrust Div., U.S. Dept. of Justice, to Garrard R. Beeney, at 5 (June 26, 1997) (“*MPEG-2 Business Review Letter*”), available at <http://www.usdoj.gov/atr/public/busreview/1170.htm>; Letter from Joel I. Klein, Asst. Att’y Gen., Antitrust Div., U.S. Dept. of Justice, to Garrard R. Beeney, at 5 (Dec. 16, 1998) (“*DVD-ROM Business Review Letter*”), available at <http://www.usdoj.gov/atr/public/busreview/2121.htm>.

³¹ *Id.*

³² See, e.g., *MPEG-2 Business Review Letter* at 6 (“[W]e would be concerned if any specific terms of any of the contemplated agreements seemed likely to restrain competition. Such possible concerns might include the likelihood that the Licensors could use the Portfolio license as a vehicle to disadvantage competitors in downstream product markets; to collude on prices outside the scope of the Portfolio license...; or to impair technology or innovation competition.”).

³³ DTLA’s suggestion that antitrust concerns should be left for the courts is cynical at best. Private antitrust actions notoriously take years to resolve and are notoriously cumbersome and burdensome. The anticompetitive die will have been cast long before a court resolves a private antitrust claim. Further, a court is not in as good a position as the Commission to weigh the various policy considerations that underlie the Commission’s Broadcast Flag regulatory regime. It is not uncommon for a court to invoke the doctrine of primary jurisdiction to refuse to hear a private antitrust suit until the relevant agency has evaluated the issues giving rise to the dispute. See, e.g., *Laveson v. Trans World Airlines*, 471 F.2d 76, 79 (3d Cir. 1972) (in private antitrust suit for price-fixing of airline headset rentals, primary jurisdiction doctrine required first resort to Civil Aeronautics Board (CAB), the agency charged with approving all airline contracts relating to transportation charges); *Johnson v. Nyack Hosp.*, 964 F.2d 116, 122 (2d Cir. 1992) (primary jurisdiction doctrine required physician to file complaint with state Public Health Council before pursuing private antitrust claim in federal court).

restrictive provisions in a license must be reasonably related and necessary to the alleged benefits of the license. If there is a less restrictive alternative, it must be used.³⁴

Here, the Commission has determined to safeguard competition by ensuring that the digital broadcast content protection technologies it approves are licensed on a reasonable and nondiscriminatory basis. A number of critical provisions in the DTCP license do not comply with that fundamental requirement. Their failure to do so pose precisely the concerns about anticompetitive effects discussed here.

IV. THE DTCP MANDATORY AND OPEN-ENDED LICENSEE NON-ASSERT PROVISION (§ 5.3) CONFISCATES INTELLECTUAL PROPERTY AND IS UNREASONABLE AND DISCRIMINATORY.

The Commission should recognize the inherent anticompetitive tendency and discriminatory effect of a licensing agreement that requires a licensee to surrender its intellectual property rights against the licensor and against other users of a technology. As Philips has commented previously, it would be nothing less than perverse for the government, as a result of regulation seeking to protect the intellectual property of content providers, to require technology manufacturers to sacrifice their own intellectual property.³⁵ Moreover, in this context, such provisions discriminate against manufacturers that own relevant IP. Such manufacturers must pay more (by giving up IP rights) than manufacturers that do not own IP. This disparity among competing manufacturers in the cost of obtaining a license is the very definition of discrimination in licensing.

³⁴ See, e.g., *Antitrust Guidelines for Collaborations Among Competitors*, Federal Trade Comm'n and U.S. Dept. of Justice, at §§ 3.2, 3.36(b) (April 2000), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf> ("Reasonable Necessity and Less Restrictive Alternatives").

³⁵ See Comments of Philips Electronics North America Corporation, MB Docket No. 02-230 (Feb. 13, 2004) at 24-25; Reply Comments of Philips Electronics North America Corporation, MB Docket No. 02-230 (March 15, 2004) at 21.

It is no coincidence that the entire CE industry, in the DFAST license, agreed upon a reciprocal obligation to license on reasonable and non-discriminatory terms rather than accepting a licensee non-assert.³⁶ Moreover, reciprocal obligations to license on reasonable and nondiscriminatory terms are the norm in those technology pools that have been reviewed by the Justice Department and deemed to pass muster under the antitrust laws, typically because the licensee is afforded the opportunity to earn a reasonable royalty on its own IP.³⁷

Further, mandatory licensee non-asserts are inconsistent with the Commission's own recognition that competition and fairness are served by a regime of reasonable and nondiscriminatory licensing. Permitting a licensing regime for the Broadcast Flag government mandate predicated upon mandatory licensee non-asserts would contravene a core principle engrained in Commission practices for more than four decades.

The DTCP License contains just such a mandatory "non-assert"³⁸ that requires licensees to forfeit any patent rights they may own that read on DTCP. This forfeiture is a condition to the

³⁶ DFAST License at ¶ 3.5, *available at* http://www.cablelabs.com/udcp/downloads/dfast_tech_license.pdf

³⁷ See, e.g., *3G Platform Business Review Letter* at 5 (licensee is paid at the same rate and under the same term as Licensors for its grant-back of any essential patents to the pool); *MPEG-2 Business Review Letter* at 8 ("Nor does the Portfolio license's grantback clause appear anticompetitive [because] its scope, like that of the license itself, is limited to Essential Patents [and permits] a fair and reasonable royalty."); *id.* at 5 (Portfolio license provides licensees with the opportunity to assert patent rights, and if independent expert determines that licensee has essential patents, licensee has option of charging a "fair and reasonable royalty" or "becom[ing] an MPEG-2 licensor and add[ing] its patent to the Portfolio."). DTLA's reliance on the DOJ and FTC Antitrust Guidelines is misplaced. *DTLA FNPRM Reply Comments* at 14, n.15. As discussed *infra*, the fact that licensee grantbacks are subject to the rule of reason does not mean they are per se lawful. Rather, they are to be subjected to searching review. As the business review letters discussed herein show, regulators typically require that licensees be entitled to earn reasonable royalties or participate as a licensor. Moreover, the Guidelines do not, as DTLA claims, discuss non-asserts, or even grantbacks, to underlying technology. Rather, the Guidelines acknowledge possible procompetitive effects in grantbacks to (the licensee's) subsequent improvements of the licensed technology. *Antitrust Guidelines* at § 5.6.

³⁸ *DTCP Certification*, App. 2, Proposed Adopter Agreement ("*Adopter Agreement*") at § 5.3.

use of DTCP. This provision is unreasonable and discriminatory on its face. There is no a priori reason to include a reciprocal non-assert as opposed to a RAND licensing obligation. The Vidi technology proposed by Philips and HP contains a RAND provision and can serve as a model for the Commission.³⁹ SmartRight also contains a RAND option in lieu of a mandatory non-assert.⁴⁰

The DTCP non-assert is made more unreasonable by several aggravating factors:

- The IP covered by the non-assert can be expanded without licensee input, thus confiscating additional intellectual property even after a licensee has evaluated its IP portfolio and decided to become a licensee. The non-asserted IP is defined in terms of “Necessary Claims,”⁴¹ which in turn are defined in terms of the “Interface,”⁴² which in turn is defined in terms of the “Specification.”⁴³ As set forth in section 3.3⁴⁴, the Specification is subject to change and expansion to enable DTLA to use DTCP on other transports. As a result, the non-assert is open-ended, and DTLA can expand its scope without licensee input. In fact, as discussed below, DTLA has made substantial changes to DTCP, including adoption of a new specification with substantial differences for the use of DTCP over Internet Protocol interfaces. DTLA is continuing to work on changes to DTCP-IP with its Content Participants.
- The license agreement makes the surrender of IP permanent. Even if a licensee ceases to be a licensee, it is forever bound by the open-ended obligation to forfeit its IP.⁴⁵

³⁹ See *In the Matter of Digital Output Protection Technology and Recording Method Certifications: Vidi Recordable DVD Protection System*, MB Docket No. 04-60 (March 1, 2004) (“*Vidi Certification*”) at App. B (“*Vidi Agreement*”) at § 2.5.

⁴⁰ See *In the Matter of Digital Output Protection Technology and Recording Method Certifications: SmartRight*, MB Docket No. 04-60 (March 1, 2004) (“*SmartRight Certification*”) at App. A (“*SmartRight Agreement*”) at § 5.5.

⁴¹ *Adopter Agreement* at § 1.22.

⁴² *Id.* at § 1.19.

⁴³ *Id.* at § 1.25.

⁴⁴ *Id.* at § 3.3.

⁴⁵ *Id.* at § 8.3. Compare *DVD-ROM Business Review Letter* at 9 (approving grant-back clause because, among other things, it had a limited “term” and no automatic renewal clause.); *3G Platform Business Review Letter* at 6 (licensee’s grant-back obligation expires at the end of the year in which its Platform (pool) license expired). Note that in both of the foregoing cases, the grant-back provided for reasonable compensation under comparable terms.

- Despite repeated requests, the 5C member companies have never identified the patents they each own. Thus, there may be companies standing in the role of DTCP licensor that do not own any essential patents. It is fundamentally unfair that they nevertheless require licensees that do own patents to surrender their rights.⁴⁶

DTLA argues⁴⁷ that the non-assert is “pro-competitive” in that it facilitates the availability of DTCP. It also, of course, reduces the incentive to develop innovative new technologies and, thus, suppresses competition for innovation and technology. Further, with all due respect, it is not up to DTLA to confiscate the IP rights of others, however valuable it might wish to make its own DTCP technology. Moreover, DTLA’s assertion that “manufacturers compete based on product features, not content protection technologies” is flatly inconsistent with DTLA’s own reliance on a supposedly competitive marketplace for content protection technology to justify its argument that the Commission need not scrutinize license terms and conditions.

DTLA also argues that the non-assert is appropriate in light of its members’ alleged agreement to license its IP at prices they declare⁴⁸ to be less than the royalty rates they “typically would charge” and set “with an eye to cost recovery.” However, DTLA has not offered to

⁴⁶ Compare *MPEG-2 Business Review Letter* at 7-8 (One reason that the pool does not appear to be illegal is that the “list of Portfolio patents attached to the . . . license will provide licensees with information they need to assess the merits of the . . . license.”). Ownership of essential patents has been considered a requirement for antitrust regulators reviewing concerted licensing by competitors. See, e.g., *MPEG-2 Business Review Letter* at 2-4 (patent pool withstands antitrust review because licensors sponsored independent, third-party search for technically-essential patents; “each of the Licensors owns at least one patent . . . identified as essential to compliance . . . with the standard;” and the expiration or invalidity of a Licensor’s last patent in the pool “terminates the Licensor’s participation” in the pool); see also *3G Platform Business Review Letter* at 6. The reason is simple—absent essential blocking patent positions, there often is no justification for allowing a consortium of potential competitors that together possess market power to collaborate rather than requiring them to compete. See *Antitrust Guidelines* at § 5.5; see *id.*, Example 10 (joint licensing venture by two competitors more likely to pass antitrust review where only blocking patents are involved).

⁴⁷ *DTCP Certification* at 17.

⁴⁸ *Id.*

subject the relationship of its costs and pricing to public scrutiny. In fact, the DTLA has carefully avoided making any statement that it will not earn a profit from DTCP, speaking only vaguely of prices set with an “eye towards cost recovery” and price *reductions* to reflect cost *reductions*. With the prospect of many, many DTCP devices in each of the more than 100 million television homes,⁴⁹ and DTLA’s proposed charge of 5 cents per certificate, the DTLA members stand to do very well, indeed, as a result of FCC certification.

Moreover, as Philips has consistently maintained, the DTLA member companies gain far more than dollars from their control of DTCP, including control over changes to the applicable technology and rules, and inside knowledge to fuel their product plans in the product markets in which even DTLA concedes manufacturers compete. DTLA is tenaciously attempting to hang on to these prerogatives in the Broadcast Flag proceeding, even to the point of arguing that the “first mover advantage” it has obtained in product markets is “one of the incentives to creation of new technologies.”⁵⁰

DTLA cites several other content protection systems that utilize reciprocal non-asserts.⁵¹ However, the agreements for these systems all were developed outside of the involvement of a government mandate, and CSS (Toshiba, MEI), CPPM (Toshiba, MEI, Intel), CPRM (Toshiba, MEI, Intel), and HDCP (Intel) all originated from, and use licenses drafted by, the same group of companies that combined to offer DTCP.⁵² Thus, rather than establishing the reasonableness of

⁴⁹ DTLA itself expects many devices in the same household to require DTCP licenses. *See DTCP Certification at 10* (describing allowance of up to 34 sink devices per network, and identifying many different kinds of devices that will require licenses).

⁵⁰ *See DTLA FNPRM Comments at 12.*

⁵¹ *DTCP Certification at 17*, citing CSS, CPPM, CPRM, HDCP, and CPS for BD-RE.

⁵² Two of the three CPS for BD-RE companies (Sony and MEI) also are 5C companies. If the Commission agrees that broadcast flag and DFAST approved technologies should not contain non-asserts, Philips will support a change in the CPS for BD-RE terms. Contrary to DTLA’s assertion, HDMI

such a provision, its use by the same group of companies only serves to underscore their market power in the digital content protection technology marketplace and to heighten the concern about its anticompetitive effects.

Further, the CSS license was accepted based on the premise that the copy protection standard would be controlled not by the original licensors, but by a broadly representative, multi-industry body, the Copy Protection Advisory Council of DVD-CCA. Changes to the CSS compliance rules require a defined, broad consensus of content providers, consumer electronics companies and IT companies. It is noteworthy that despite these expected safeguards, the original founders enshrined their own DTCP copy protection system with a substantially favored position before handing over control of the CSS specification to CPAC.

DTLA argues that because Philips accepted the DFAST license, which in turn, accepts DTCP and HDCP, it is somehow estopped from objecting to the provisions of the DTCP license.⁵³ To the contrary, Philips accepted DFAST, which contains a reciprocal RAND obligation instead of a non-assert, not the DTCP or HDCP licenses. Unlike the Broadcast Flag proceeding, neither DTCP nor HDCP were before the Commission for review in the FCC's digital "plug and play" proceeding.⁵⁴ At the same time, Philips was urging the Commission to adopt procedures to ensure that approved technologies under both the Broadcast Flag and DFAST are licensed on reasonable, nondiscriminatory and pro-competitive terms.

includes a provision granting potential licensee patent owners the right to submit their Necessary Claims for examination and, thereupon to become licensors.

⁵³ See *DTLA FNPRM Reply Comments* at 15-16.

⁵⁴ See *In the Matter of the Implementation of Section 304 of the Telecommunications Act of 1996, the Commercial Availability of Navigation Devices*, PP Docket No. 00-67, CS Docket No. 97-80, *Second Report and Order and Second Further Notice of Proposed Rulemaking*, 18 FCC Rcd 20885 (2003).

Necessary Change. If the Commission is to approve DTCP, such approval must be conditioned on DTLA removing any reciprocal non-assert from its agreement and replacing it with a reciprocal obligation to license on reasonable and nondiscriminatory terms. Alternatively, DTLA should be required to grant adopters the option of declining the reciprocal non-asserts and accepting a mutual obligation to license necessary claims on RAND terms. In addition, the reciprocal obligation should not be subject to changes in scope, should be clearly and correctly linked to disclosed patents or other legitimately protected intellectual property that the licensee is required to license and should not apply to any activity other than the use of DTCP to protect commercial audiovisual content.

Further, as a condition for maintaining any reciprocal obligation, the DTLA member companies should be required to identify essential patents that they are licensing. While the companies should not be required to provide an exhaustive list, they should be required to provide a good faith list to inform licensees and potential licensees of the scope of their rights and to support the reasonableness of imposing a reciprocal licensing obligation.

V. DTLA’S ASSERTION OF THE POWER TO CONTROL DOWNSTREAM APPROVAL OF TECHNOLOGIES IS ANTICOMPETITIVE AND UNREASONABLE.

It should be obvious that giving one competitor the right to veto the downstream use of a competing technology raises extreme competitive risks that should not be countenanced in the broadcast flag regulation. These risks are heightened when a consortium of competitors with market power wields the veto. Absent compelling circumstances, any technology deemed by the Commission to provide appropriate protection to broadcast DTV content should be deemed acceptable by any other approved technology for downstream use.

The proposed DTCP license agreement asserts the extraordinary right to approve or disapprove technologies that compete with DTCP or with other technologies that may be sponsored by the 5C member companies. The DTCP Compliance Rules for Sink Functions⁵⁵, specifically limits the digital outputs a DTCP licensed sink device may use for flagged DTV broadcast content it receives over a DTCP link to those specifically approved by DTLA. Not surprisingly, the only technology now approved (except for certain computer products) are none other than DTCP and HDCP!⁵⁶ The proposed DTCP license agreement likewise limits the recording protection technologies that a DTCP sink device can use.⁵⁷

These approval rights provide DTLA with the power effectively to kill competition by prohibiting the sink devices that decrypt the technology from using a competing technology as an output from that sink device. It also gives DTLA the power to inhibit competition in recording protection technologies by favoring technologies promoted by DTLA members. As the American Antitrust Institute (“AAI”) has said, “[c]onsumers adopting DTCP-compliant receivers... would be locked into devices that are DTCP compliant.”⁵⁸ “This would. . . make something of a mockery of the proposal that an initial technology could be approved while at the same time leaving the door open for the later introduction of competing approaches.”⁵⁹

⁵⁵ *Adopter Agreement*, Ex. B, Part I.

⁵⁶ *Id.* at § 4.4; *DTCP Certification* at 23.

⁵⁷ *Adopter Agreement*, Ex. B, Part I, at § 2.2.1.

⁵⁸ See Reply Comments of the American Antitrust Institute (“AAI”), MB Docket No. 02-230 (Feb. 19, 2003) (“*AAI Reply Comments*”) at 10-11

⁵⁹ *Id.*

Further, DTLA concedes that it gives its Content Participants the power to veto proposed alternative technologies (subject to a burdensome and time consuming arbitration process).⁶⁰ The Commission properly recognized concerns “with one industry segment exercising a significant degree of control over decisions regarding the approval and use of content protection and recording technologies in DTV-related equipment.”⁶¹ It is no more appropriate to provide that control one step downstream.

Competition can be harmed not only by rejection but also by delayed approval. If the FCC does not require automatic approval, any new technology will need to seek out and obtain separate approval not only from the FCC, but also from *every other provider of a technology* that may protect content provided to a device that will use the technology. Thus, for example, a technology designed to protect digital interfaces or digital recordings (such as Vidi) would need approval from FCC, CableLabs, DTLA, the 4C, and any other administrators of approved technologies. Such approvals will be burdensome and will likely take long periods of time,⁶² in circumstances where delay can kill or cripple the adoption of a new technology. Further, in many cases, these approvals would require the blessing of direct competitors or of each member of consortia containing companies with interests in direct competitors. At minimum, such a process would create delay and uncertainty that will stifle innovation. At its worst, the process would create intolerable entry barriers, destroying the very competitive marketplace the Commission seeks to foster.

⁶⁰ *DTCP Certification* at 23.

⁶¹ *Broadcast Flag Report and Order* at ¶ 52.

⁶² For example, DTCP approval of CPS for BD-RE, auspiciously granted on March 15, on the eve of DTLA’s filing in this proceeding, took almost 10 months. The request was submitted in May, 2003.

The distorting competitive effects of delayed or denied downstream approval will extend beyond content protection technologies to products and product formats. For example, CPRM was designed for use on DVD-RW recorders. The use of CPRM on DVD+RW recorders would have required the use of discs that are incompatible with legacy +RW recorders, creating a substantial consumer disadvantage. That, in turn led to the development of Vidi. Today, as a practical matter, there is no DTCP approved record protection technology that can be used on a DVD+RW recorder, potentially placing an entire format, with substantial consumer benefits, at a competitive disadvantage wholly unrelated to the merits of the format.

There rarely is a valid reason for an approved technology to not allow the use of *any other approved technology* in its sink devices. If a technology provides adequate security when it is used by a directly covered Demodulator Product, it will provide adequate security for use by a downstream product. As DTLA itself recognizes,⁶³ “it is axiomatic that any chain is only as strong as its weakest link.”

Nor, despite DTLA’s protestations, is there any question of incompatibility. Once a sink/playback device decrypts redistribution-controlled content, it will know that the content is so protected, and should be able to route the content to any output or recording that is protected by a technology that the Commission has determined is suitable for redistribution controlled

⁶³ *DTCP Certification* at 23.

content.⁶⁴ This is the approach reflected in the Vidi technology compliance rules submitted by Philips and HP.⁶⁵ It is also reflected in the SmartRight compliance rules.⁶⁶

DTLA speculates⁶⁷ that consumers will be harmed because, if the Commission mandates automatic downstream approval, content providers may not mark non-broadcast content with the EPN encoding that signals broadcast flag redistribution control. They characterize such other content as “higher value.” This argument is an attack on the very premise of the Commission’s broadcast flag decision. The Commission adopted the broadcast flag rule in response to content provider arguments that broadcast DTV content should not be disadvantaged or receive inferior protection against redistribution compared to other content on the theory that, if it did, DTV content would migrate to pay media, jeopardizing the continued viability of free over-the-air broadcasting.⁶⁸ As the MPAA and its co-commenters argued in seeking the Broadcast Flag rule, “the question is about the future of over-the-air broadcast television, and whether, as a matter of public policy, the Commission should promote the adoption and implementation of a technology that will help to foster an environment in which broadcasters, cable systems and satellite providers can compete on a level playing field for high-quality digital content.”⁶⁹ DTLA argues

⁶⁴ There may be compelling, unusual circumstances where a technology provider can demonstrate that this is not the case. For example, HDCP, which was engineered to be a simple system without any copy control information for non-recordable transport to displays, may be limited in its ability to hand off content to multi-function link protection systems. However, such circumstances are not present with DTCP.

⁶⁵ See *Vidi Agreement*, Ex. A (Compliance and Robust Rules) at § A.1.2.2.1.

⁶⁶ See *SmartRight Agreement*, Ex. B (Compliance Rules) at §§ 2.2(a)(iii), 2.2(b)(ii).

⁶⁷ See *DTLA FNPRM Reply Comments* at 17.

⁶⁸ See *Broadcast Flag FNPRM* at ¶ 6, 31.

⁶⁹ See Reply Comments of the Motion Picture Association of America, Inc., *et al.*, MB Docket No. 02-230 (Feb. 20, 2003) at 4.

that the 5C or its Content Participants should be free to destroy this level playing field by creating two classes of redistribution controlled content—“Broadcast” and “Other More Valuable.” Such a result is inimical to the Commission’s goal in adopting the broadcast flag and to the arguments of the content providers on which the decision was based. There is no justification for treating broadcast content any differently than other content for which the same level of protection—redistribution control—has been signaled.⁷⁰

DTLA erroneously relies on the economic concept of “network effects” in support of the proposition that the Commission need not worry, because DTLA will have a marketplace incentive to approve as many technologies as possible.⁷¹ As discussed above, DTLA has it backwards. According to one of the expert agencies charged with protecting competition, industries characterized by network effects present additional antitrust challenges. As the [then] Deputy Assistant Attorney General for Antitrust has said, “In industries in which network effects are significant, there is an *increased likelihood* that a single firm may come to dominate the market and persist in that dominance. . . . Such a firm may, in fact, have *an incentive to adopt competitive strategies* that support a single standard by *preventing the products of rivals from achieving compatibility*.”⁷²

The Justice Department’s view, not DTLA’s, is consistent with common experience. Competitors often employ non-interoperability in order to preserve their competitive position.

⁷⁰ Equally absurd and inimical to the Commission’s order is DTLA’s argument that content providers might “withdraw their use and approval of DTCP” if they do not like the technologies approved by the Commission. Of course, in that case, the content providers’ complaints would be properly directed to the Commission, not for DTLA. In any event, there would be nothing for the content providers to “withdraw.” Content providers’ “approval” is not necessary for the use of DTCP.

⁷¹ *DTLA FNRPM Comments* at 16 (“under the economic law of network effects, the ability to communicate between systems makes each system that much more valuable”).

⁷² *Rubinfeld Speech* at 4-5 (emphasis added); *see* n.25, *supra*.

For instance, General Motors manufactures vehicles that cannot use Ford replacement parts, and vice versa. Likewise, the software industry often uses non-interoperability as a means of preserving market advantage. Such non-interoperability in the context of the government-mandated digital broadcast content protection technology market would only serve to magnify any first-mover advantage created when the government approves some technologies before others. Consumers who have already purchased some devices containing content protection technology will not likely purchase devices with alternative technology if they cannot use all of them together. Where the later-approved technology proves superior for purposes of simultaneously protecting content from indiscriminate redistribution over the Internet *and* preserving consumer use and enjoyment of digital broadcast content, the Commission's stated goal in the Broadcast Flag proceeding, non-interoperability would lead to the rejection of the superior technology by the government-mandated marketplace. The Commission should not engineer the defeat of its goals in the Broadcast Flag proceeding in such a manner.

Competition among technologies and products should be decided on the merits of the technologies and products. It should not be decided through the need to obtain approval by dominant consortia, which may be guided by competitive interests other than the efficacy of a technology or the needs of a coherent content protection system.

Necessary Change. If the Commission is to approve DTCP, such approval must be conditioned on requiring DTLA to provide in its compliance rules that in the United States, Decrypted DTCP content bearing the EPN (redistribution controlled) state (i) may be output over any output technology that is permitted by the Commission under §73.9004(a)⁷³, and (ii) may be

⁷³ 47 C.F.R. § 73.9004(a)

recorded using any technology that is permitted by the Commission under § 73.9004(b).⁷⁴ At minimum, any Authorized Digital Output Protection Technology and any Authorized Recording Method should be deemed approved by DTLA for use with EPN content.

VI. DTLA’S ASSERTION OF THE RIGHT TO CHANGE COMPLIANCE RULES AND TECHNOLOGY WITHOUT LICENSEE INPUT IS UNREASONABLE AND DISCRIMINATORY.

Antitrust concerns are compounded by the founders’ ability to change the compliance rules over time in ways that can competitively disadvantage licensees that are founders’ direct product rivals. Competitive mischief can occur not only through changes that favor the founders’ own products and unduly burden competitors’ products but also by the time-to-market advantage that comes from a potentially major lag between when founders know and when their competitors know about the changes to be imposed.

The proposed DTCP Agreement would grant to DTLA the right to make changes in the Compliance Rules applicable to broadcast DTV content delivered over a DTCP protected interface regardless of whether the FCC has concluded, by amendment to Part 73, that such a change is necessary to protect DTV content or is in the public interest.⁷⁵ DTLA also reserves the right to make changes to the Specification for DTCP.

The changes permitted by the DTCP Agreement do not require DTLA to seek approval or accommodate the interests of licensees, who invest millions of dollars in product design, development and manufacturing on the basis of the approval of a technology. By contrast, Content Participants are given the right to object and to arbitrate over proposed changes.⁷⁶ This

⁷⁴ 47 C.F.R. § 73.9004(b)

⁷⁵ *Adopter Agreement* at § 3.3.3.

⁷⁶ The “Content Participant Implementers’ Forum” touted by DTLA is an after the fact notification process that imposes no obligations on DTLA. *See DTCP Certification* at 21.

one-sided change management process is unreasonable and discriminates against implementer licensees.

While DTLA downplays the scope of permissible changes⁷⁷, in fact, the scope has been construed quite broadly by DTLA. Under section 3.3.3, DTLA claims the right to make unlimited changes in the Compliance Rules that do not "materially increase the cost or complexity of implementations of licensed products." Further, DTLA asserts the right to change Compliance Rules at any time it, in consultation with content providers, but not licensees, concludes they are "necessary to ensure and maintain content protection." Further, DTLA asserts the right to change the DTCP technology itself in order to "permit DTCP to be used with transports other than those permitted" by the current Specification and to make "non-material" changes to the Specification, with examples of "materiality" limited to those that create "compatibility problems".⁷⁸

DTLA has relied on section 3.3 to make significant changes in the rules applicable to content delivered over interfaces protected by DTCP. Thus, for example, DTLA has used its change rights to add the concept of EPN "redistribution controlled content"⁷⁹, limit PVR copying to 90 minutes before such copies are counted as a first generation copy⁸⁰, and limited previously unlimited first generation copies to two per format.⁸¹ In 2003, at the time it announced the availability of DTCP over IP, DTLA also announced a mandatory reduction in the number of

⁷⁷ *DTCP Certification* at 20-21.

⁷⁸ *Adopter Agreement* at § 3.3.1.

⁷⁹ *Adopter Agreement*, Ex. B, Part I, at § 2.4

⁸⁰ *Id.* at § 2.2.1.4

⁸¹ *Id.* at § 2.2.2

authorized sinks from 62 to 34 for all applications of DTCP over all interfaces. Each of these mandatory changes affects consumers' ability to handle content and thus affect public policy.

When it announced DTCP over IP, DTLA also made a fundamental change in the DTCP technology, changing the cipher from M6 to AES. DTLA has also announced that it is engaging in closed-door negotiations with its Content Participants to further limit the handling of content over IP interfaces, and that these negotiations will result in a change in the DTCP Specification. DTLA Work Plan for Localization.⁸² In other words, the DTCP technology for IP is not yet “fixed” in a sufficiently meaningful way to permit the Commission to evaluate it. Licensees are not permitted to participate in those discussions and will be required to accept any changes that are announced, changing DTCP over IP products in mid-design or scrapping them.⁸³

Moreover, as discussed in detail in prior Philips filings in the Broadcast Flag proceeding,⁸⁴ the ability of a licensor to impose changes unilaterally without notice or opportunity for licensee input has the potential to confer upon licensors enormous competitive advantage. Privately negotiated changes may be mandatory and more restrictive than provided under current versions of the licenses or “voluntary” and less restrictive. Either type of change may be targeted to enhance licensors' business models or interfere with new products being developed by licensee competitors.

⁸² DTLA Work Plan for Localizing Transmissions (Sept. 2003), *available at* http://www.dtcp.com/data/Work_Plan_09092003.pdf

⁸³ *Id.*

⁸⁴ *See* Comments of Philips Electronic North America Corporation, MB Docket No. 02-230 (Feb. 19, 2003) at 28-29; Letter from Thomas B. Patton, Philips Electronic North America Corporation, to Chairman Michael K. Powell, at 6-8 (Oct. 22, 2003).

Absent open and fair change management procedures, there would be nothing to assure that copy limitations, restrictions on digital and analog outputs, limitations on PVR processing, and other rules won't be imposed by fiat. The concerted decisions of the "in" group without input from or advance notice to competing outsiders enable the licensors to use their control over these rules to disadvantage competitors or disrupt their plans in the market for consumer electronics products themselves. As noted by a leading official of the Justice Department, "it is important that competition in markets for complementary products be based on the merits and not be diminished by the strategic behavior of a firm with a dominant position in a market."⁸⁵ These concerns are magnified when the dominant position belongs not to a single competitor, but to a jointly-acting consortium of competitors.⁸⁶

Licensors will have advance, inside information, affording them substantial lead-time to market and other competitive advantages in their investments, business strategies, and product design. The AAI cited potential first mover advantage in commenting in the Broadcast Flag proceeding that the ability of the licensor to amend the license terms "raises anticompetitive concerns."⁸⁷

While DTLA denies that content protection provides manufacturers with competitive advantages, there have already been examples that demonstrate the symbiotic relationship between copy protection systems and product design. Thus, for example, it was discovered that CPRM could not be implemented on DVD+RW recording devices without the adoption of a

⁸⁵ *Rubinfeld Speech* at 24.

⁸⁶ See *DVD-ROM Business Review Letter* at 5-8 (describing competitive harm in using patent pool to obtain advantage in market for "downstream products" or "complements" to the standard, such as packaging methods for DVD-ROMs, a useful complement to the licensed manufacturing technology); *3G Platform Business Review Letter* at 9, 12.

⁸⁷ *AAI Reply Comments* at 12-13.

new, incompatible, disc design. Also, for example, despite the fact that every CE company is working eagerly to be the first and best to develop wireless networking applications using Internet Protocol-based transports, DTCP over IP involved (and continues to involve) fundamental changes to DTCP that could have been known only to insider companies.

One-sided changes can also significantly threaten consumer use of digital broadcast content in a manner that falls outside the scope of the Broadcast Flag regulation. Only by providing implementers with the ability to participate in any changes to an approved technology can the Commission be sure that “change management” does not become synonymous with “rewrite” of the Broadcast Flag regulation, or enable serious, anticompetitive exacerbation of first-mover advantages to licensors in the marketplace.⁸⁸

The Commission is considering the approval of DTCP as it has been presented, with the rules that are presented. That is the technology and those are the rules that are subject to scrutiny and about which all parties are commenting. The Commission should not grant an open-ended approval right that enables DTLA to make fundamental changes in the public policy represented by approved compliance rules. Further, the Commission should not make licensees buy the proverbial pig in a poke, and make investments in reliance on an approved technology that is subject to change.

⁸⁸ MPAA recognizes the importance of changes, asking that a technology be decertified if a change is made that is not approved by either the Commission or content providers. *See* Comments of the Motion Picture Association of America, Inc., *et al.*, MB Docket No. 02-230 (Feb. 13, 2004), App. A., 8. The same rationale applies to changes that adversely affect implementers.

Necessary Changes. As discussed in Part VI, Compliance Rules applicable to EPN content should be those the Commission has decided are necessary and appropriate in Part 73. Necessary changes should be subject to the process of amending Part 73. Any changes that are to be permitted should be subject to an open process that includes early, specific notice to licensees, licensee input, and Commission review and approval of the change, considering its impact on licensees and the public, as well as on content providers.

VII. THE DTCP COMPLIANCE RULES DISCRIMINATE UNREASONABLY AGAINST CONSUMER ELECTRONICS DEVICES.

As Philips has previously advised, CE and IT products are increasingly in direct competition with each other. Differential licensing terms have the potential to skew consumer decisions in favor of one class of devices over another. This is particularly dangerous as industry and consumers adjust to the growing convergence between sectors. Just as the Commission should judge CE and IT devices for compliance with the Broadcast Flag regulation under one set of objective criteria, licensing terms should be required to do the same to the greatest extent possible.

CE products have not been used for the indiscriminate redistribution of music and analog broadcast content over the Internet, and there is no justification for placing more stringent digital content protection restraints on them compared to IT products. In fact, just the opposite is true, although Philips does not seek such an approach.

The DTCP compliance rules discriminate in an important respect between consumer electronics and computer products in favor of IT devices. Specifically, although computer products are permitted to use unprotected standard definition and high definition analog VGA, SVGA, SXGA, and UXGA outputs, CE devices are prohibited from using such outputs for Copy

One Generation, Copy No More or Copy Never Content, despite the fact that CE devices may be used to feed high quality monitors that use such inputs.⁸⁹

Although this discriminatory provision does not apply to EPN content, the provision is contained in the only DTCP agreement that is made available for handling EPN content. Further, the discriminatory effect does apply to another regulatory regime administered by the Commission—the DFAST license.

This discrimination provides little or no added content protection for, as discussed above, a chain is only as strong as its weakest link. Further, any added protection that is provided is outweighed by the adverse effects of favoring one class of product over another. The Commission should not countenance this discrimination.

Necessary Change. If the Commission approves DTCP, it should do so on condition that DTLA amends the DTCP Compliance Rules in the following manner: (1) In Compliance Rule 4.2(b), strike the words “the Licensed Product is incorporated into a Computer Product and.”; and (2) In Compliance Rule 4.3.3, strike the words “incorporated into Computer Products.”

VIII. DTLA SHOULD NOT IMPOSE COMPLIANCE REQUIREMENTS THAT EXTEND BEYOND THOSE THE COMMISSION HAS DEEMED NECESSARY AND APPROPRIATE TO PROTECT REDISTRIBUTION-CONTROLLED CONTENT.

The compliance rules adopted by the Commission establish the requirements for what is necessary and appropriate to protect broadcast DTV content from unauthorized, indiscriminate Internet redistribution. They are the only rules that apply to Covered Demodulator Products, which can be almost any product in the content chain within the home. It is not rational to

⁸⁹ *Adopter Agreement*, Ex. B. Part I, §§ 4.2(b), 4.3.3.

impose a different standard on downstream devices through the use of compliance rules established by technology licensors.

It is well known that the level of security provided by a system is equal to the security provided by the weakest link in that system. DTLA concedes this point in precisely these words.⁹⁰ Higher downstream standards will, therefore, not add to the security provided to redistribution-controlled content; they will only add cost and complexity that will further confound a consumer interested in participating in the digital transition.

Further, the compliance rules dictate what a consumer can do with content. Thus, they are imbued with public policy significance. In fact, the rules that apply when a sink or playback device decrypts content that has been passed from a Covered Demodulator Product using an Authorized Recording Method or an Authorized Digital Output Protection Technology are the means of propagating the Commission's decision downstream. If the Commission has decided, after extensive notice and comment, that restrictions are not necessary to provide redistribution control, there is no rationale for allowing private parties that seek Commission approval for their technologies to make different decisions. Thus, any effort to impose stricter rules must be supported by compelling justification. For the reasons discussed above, the fact that redistribution controlled content may include content other than broadcast DTV is not such a compelling reason.

The Compliance Rules in the proposed DTCP Agreement applicable to redistribution-controlled content differs from the rules set by the Commission in an important respect, in

⁹⁰ *DTCP Certification* at 21.

addition to the assertion of the separate right to approve output and record protection technologies, discussed in Part III, above. Specifically, while the Commission's compliance rules allow copies of broadcast content on non-removable media to be made when they are uniquely associated with a device by physical, rather than cryptographic, means, DTCP does not.⁹¹

This DTCP rule interferes with the ability of manufacturers to develop creative new means of handling content on personal digital video recorders (i.e., "God's Machines"). There is no content protection benefit to be gained by this rule. Indeed, not only are such physically bound copies permitted upstream of DTCP in Covered Demodulator Products, they are permitted downstream of DTCP under the CPRM compliance rules, which have been approved by DTCP.⁹²

Necessary Change. If the Commission approves DTCP, it should do so on condition that DTLA amends the DTCP Compliance Rules in the following manner: In Compliance Rule 2.2.1.2, insert the words "or other effective means" after "encryption protocol".

IX. DTCP SHOULD BE APPROVED FOR SPECIFIC TRANSPORTS WHERE THE TECHNOLOGY IS DEFINED.

DTLA seeks a carte-blanche approval for any technology it may decide to call DTCP over any interface. Such an approval would deprive the Commission of any ability to review the technology or licensing terms that may apply to the new transport. This request should be denied.

⁹¹ Compare 47 C.F.R. 73.9004(b)(1) (allowing use of a "cryptographic protocol or other effective means"), with Ex. B Part I, § 2.2.1.2 (requiring use of "an encryption protocol").

⁹² See *In the Matter of Digital Output Protection Technology and Recording Method Certifications: Content Protection Recordable Media for Video Content*, MB Docket No. 04-62 (March 1, 2004), Ex. 1 (License Agreement), Ex. C-3a, §§ 4.2, 1.5 (defining "Bound Recording Method" to include "a cryptographic protocol or other effective means.").

The Commission has correctly decided that it should evaluate technology proposals for compliance with its standards. There is little point to such an evaluation if, once approved, a technology proponent is free to declare a different technology, subject to different rules, to be within the scope of approval. It is not uncommon for different transports and platforms to require different technologies.

As already discussed, DTCP over IP is a very different technology than DTCP over 1394. Moreover, DTLA is in the process of changing DTCP-IP. The ultimate rules applicable to DTCP-IP have not been set. The applicable specification and compliance rules are subject to change. The fact that a technology bears the name DTCP should not be sufficient to garner it automatic approval from the Commission.

Necessary Change. If the Commission approves DTCP, it should do so only on a transport-by-transport basis, after the specification and applicable rules are stable and clearly defined. If DTLA believes that a different technology named DTCP is appropriate for a different transport, DTLA has the right, like any other technology proponent, to submit that technology for approval under the Commission's expedited approval process.

X. CONCLUSION

The Commission, in its Broadcast Flag rules, wisely and consistent with decades of precedent, has required digital broadcast content protection technologies to be licensed on reasonable and nondiscriminatory terms. The DTCP license fails that fundamental test of fairness. Through its mandatory non-assert provisions, its right to reject downstream technologies even if they are approved by the Commission, its change management provisions which effectively put manufacturer licensees at the mercy of the DTLA in marked contrast to content participants, and several other specific provisions, the DTCP license is unreasonable,

discriminatory and anticompetitive. If DTCP is to be approved by the Commission, Philips respectfully submits that such approval be conditioned on elimination of these provisions and substitution of terms and conditions compliant with the reasonable and nondiscriminatory licensing obligation found in the Broadcast Flag regulations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing were served on the following individuals on April 6, 2004, by first-class mail, postage pre-paid:

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